IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

| | |
|---|---|
| NATIONAL PLATE & WINDOW GLASS CO., INC., *Appellee,* v. UNITED STATES OF AMERICA, *Appellant.* | No. 24913 |

## PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE HONORABLE JUDGES THEREOF.

The appellee respectfully petitions this Honorable Court for a rehearing in the appeal of the above-entitled matter, pursuant to Rule 25 of the Rules of this Court, and as a basis of such petition sets forth the following errors of fact and law.

This appeal is from a judgment of this Court decided April 7, 1958, reversing an order of the U. S. District Court for the Eastern District of New York, which Court granted the appellee's motion to quash a Commissioner of Internal Revenue summons issued under Section 7602 of the U. S. Internal Revenue Code of 1954.

### I.

In stating in its opinion the following (p. 990)

> "Moreover, the records sought below may well have been pertinent to the investigation of appellee's tax

> liability for 1954-1956. For those liabilities, so far as it appears, no notice of deficiency had been mailed and no petition for review by the Tax Court had been filed. Consequently Section 6212 by its plain terms was inapplicable. Norda Essential Oil & Chemical Co. v. United States, 2nd Cir. F (2d) 764."

This Court was apparently relying upon the evidence in the printed record below which did not contain any facts to the contrary. However, the Court overlooked the statement by the counsel for the appellee upon oral argument to the effect that a statutory notice of deficiency had been received by the taxpayer for the fiscal year 1954 and that a petition for review had been filed with the Tax Court of the United States for that year. Both the Notice of Deficiency and petition for review for the fiscal year 1954 occurred after the argument below and after the filing of the notice of appeal from the decision below by the appellant.

A copy of the petition, the statutory notice of deficiency and the answer of the Commissioner of Internal Revenue covering the fiscal year ended August 31, 1954 are annexed and marked Exhibits 1, 2 and 3, respectively.

In both of the fiscal years 1953 and 1954, therefore, determinations of the tax liabilities had been made by the Commissioner of Internal Revenue and petitions and answers were filed in the Tax Court of the United States. Consequently, this Court was incorrect in its statement that Section 6212 was not applicable to sustain the determination of the Court below. Since Section 6212(c) is specifically applicable, the only basis upon which this Court in its opinion reverses the Court below, notwithstanding Section 6212, is that that Section "does not proscribe resort to subpoena in an effort to ascertain whether fraud exists. Especially is that so when, as here, a possibility of fraud appears. Boren v. Tucker, 9 Circ. 239 F(2d) 767, at page 733. Cf. Application of the United States (Carroll) 2 Cir. 246 F(2d) 762, cert. den. 355 U. S. 857."

In making that statement with regard to the Commissioner's power, this Court could not have taken into consideration the action taken by the Commissioner of Internal Revenue in his answer to the taxpayer's petition in the Tax Court of the United States to review the assessment for the year 1954, which was made at a date subsequent to the affidavits of the Special Agents of the Intelligence Division in this case below. Again, since this Court did not have the benefit of that answer in the record printed on appeal, it could not know except from what had been said in oral argument that the Commissioner of Internal Revenue had disclaimed any allegation of fraud with respect to the year 1954.

Obviously, as indicated by the annexed answer, Exhibit 3, the Commissioner's action subsequent to the proceeding below and for which year like for the year 1953 he likewise made no claim of fraud, effectively removes from consideration by this Court the allegation of the Special Agent below that "possibility of fraud appears."

It is inconceivable that the action of the Special Agents, whose summons is issued in the name of the Commissioner of Internal Revenue under the power given to the Commissioner of Internal Revenue under Section 7602 of the U.S. Internal Revenue Code of 1954, can be supported by an allegation of possible fraud by the Special Agents when *thereafter* in a formal proceeding in the Tax Court the same Commissioner makes no such claim of fraud whatsoever.

The bonafides of the action of the Special Agents in connection with the issuance of the subpoena for the year 1954 at issue in the Tax Court of the United States may very well be questioned by virtue of what the Commissioner of Internal Revenue did in the Tax Court thereafter. Indeed, it would seem clearer than ever that their action is nothing more than a subterfuge to obtain by indirection

what they could not do under the procedures provided for litigants in the Tax Court of the United States.

Even without this additional proof of the non-existence of any claim for fraud for 1954, the District Court was well aware from the evidence before it that as to the fiscal year 1953 the Commissioner likewise made no claim in his answer to the petition of the taxpayer as to any possible fraud.

Consequently, with these new facts before this Court, none of the cases cited in this Court's interpretation of Section 6212 apply. Those cases did not apply because (a) they did not involve an interpretation of Section 6212 but on the contrary, involve an interpretation of Section 7602 as limited by Section 7605(b), and (b) in all of those cases there was a sufficient showing of the existence of probable fraud to warrant further examination.

Obviously, this Court did not intend to interpret Section 6212 as requiring a lesser showing of the existence of probable fraud than the vast majority of cases interpreting the same requirement to warrant a second inspection or examination under Section 7605(b). *Pacific Mills* v. *Kennefick*, 99 F(2d) 188.

In this regard this Court's attention is specifically invited to the recent decision of the First Circuit Court of Appeals in the case of *O'Connor* v. *O'Connell*, 1 A F T R 2nd 58-1209(P. H.) with regard to further examinations under Section 7602 as limited by Section 7605(b).

## II.

This Court, in stating that there was not a completed inspection, within the meaning of Section 7605(b), of the books and records of the taxpayer, overlooked the significant fact that a notice of deficiency had been issued by the Commissioner determining the tax for the years 1953 and

1954, and that such determination had been made as a result of a joint investigation by revenue agents and special agents. Having made such a determination and the matter having been placed before the Tax Court of the United States, any further investigation for those years by the Commissioner is unnecessary and not permitted by Section 7605(b). *Pacific Mills* v. *Kennefick*, *supra*. Once the Commissioner has made a determination by the filing of a notice of deficiency for a taxable year, the assumption exists that a sufficient investigation has been made to warrant the notice of deficiency. The failure on the part of the taxpayer to impugn or contravene that determination will result in an absolute judgment against him under Section 6213(c). However, it could not have been the intention of this Court to permit a further examination under Section 7605(b) on the theory that there was still a continuing inspection where the matter had already been placed before the Tax Court of the United States.

## III.

In interpreting Section 6214, which permits the Tax Court to assess a deficiency greater than that determined by the Commissioner, to permit the Commissioner to issue a subpoena to examine the books and records of the taxpayer for a year then in issue in the Tax Court, this Court has provided the Commissioner with a power non-existent in the Statute. Particularly in its interpretation of Section 6212 wherein the Commissioner need not even show that a probability of fraud exists, this Court has given the Commissioner of Internal Revenue, a litigant in the Tax Court, a right of discovery which has not been provided by Congress and which is not equally available to the taxpayer, the other litigant to the proceeding. Such an interpretation, it is respectfully submitted, would be a violation of the due process clause of the Constitution.

## CONCLUSION

For the reasons hereinbefore set forth, it is respectfully requested that the petition for rehearing be granted.

BERNARD WEISS
*Attorney for Appellee*
136 East 57th Street
New York 22, N. Y.

## CERTIFICATE OF COUNSEL

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Bernard Weiss, being duly sworn on oath, certifies and says that he makes this certificate in compliance with Rule 25 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

BERNARD WEISS

April 17 1958

**EXHIBIT 1**

IN THE

TAX COURT OF THE UNITED STATES

| | |
|---|---|
| NATIONAL PLATE & WINDOW GLASS CO., INC., *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*. | Docket No. 71278 |

**Petition**

The above-named taxpayer hereby petitions this Honorable Court to review the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Symbols UM: Au: R: JTL: mw) dated October 28, 1957, and as a basis of this proceeding alleges as follows:

1. The petitioner is a New York corporation with principal place of business at 139-05 Archer Avenue, Jamaica 35, N. Y. The return for the period herein involved was filed with the District Director of Internal Revenue for the District of Brooklyn, N. Y.

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A", was mailed to the petitioner on October 28, 1957.

3. The deficiency as determined by the Commissioner of Internal Revenue is in income and excess profits taxes for the fiscal year ended August 31, 1954 in the amount of $11,203.81, all of which is in controversy.

4. The determination of the tax set forth in said deficiency notice is based on the following errors:

(a) In determining the tax liability for the fiscal year ended August 31, 1954, the Commissioner of Internal Revenue in arriving at the amount of taxable net income of petitioner disallowed without detailed explanation the following items which were deducted by the petitioner:

| | Expenses per Books and Tax Return | Amount Disallowed |
|---|---|---|
| (1) Salesmen's Expenses | $ 7,087.39 | $6,888.71 |
| (2) Traveling & Entert'n'g Exp. | 6,968.19 | 3,940.11 |
| (3) Commissions | 7,120.14 | 6,831.96 |
| (4) Telephone | 4,602.55 | 217.34 |
| (5) Petty cash expenses | * | 4,405.67 |
| (6) Freight | 32,597.36 | 318.13 |
| (7) Purchases | 830,201.07 | 835.43 |
| (8) Bad Debts | 2,423.71 | 2,423.71 |

*There is no account on taxpayer's books called Petty cash expense.

(b) The Commissioner of Internal Revenue has increased taxpayer's taxable income with an item called "Income" without setting forth any details as to what this item represents.

5. The facts upon which the taxpayer relies as the basis for this proceeding are as follows:

(a) The taxpayer files its Federal income tax returns on an accrual basis with a fiscal year ended August 31st.

(b) The taxpayer employs a regular bookkeeper and such other personnel as may be required from time to time to keep the books and records and

such records reflect the business transactions of the petitioner.

(c) These books and records are audited by a certified public accountant, who prepared its income tax returns based on the results of the business operations reflected in such books and records.

(d) The Commissioner of Internal Revenue, while making a detailed examination of the taxpayer's records, has arbitrarily disallowed $6,888.71 out of $7,087.39 of Salesmen's Expenses actually incurred and paid by the taxpayer and reflected in taxpayer's books and records without setting forth the detailed basis for such disallowance.

(e) Of the amount of $6,968.19 claimed by the taxpayer as Travel and Entertaining Expenses, the Commissioner of Internal Revenue similarly disallowed $3,940.11 without setting forth which items are the basis for such disallowance.

(f) Of a total amount of Commissions incurred and paid, aggregating $7,120.14, the Commissioner of Internal Revenue has arbitrarily disallowed $6,831.96 without showing the detailed basis for such disallowance.

(g) The Commissioner of Internal Revenue has disallowed $217.34 of Telephone Expenses of a total of $4,602.57 incurred and paid, without setting forth which item or items are disallowed.

(h) The Commissioner of Internal Revenue has arbitrarily disallowed all expenses paid through Petty Cash without regard to the nature of the expense or the detailed records kept.

(i) The Commissioner of Internal Revenue has disallowed $318.13 of Freight Expenses incurred of

a total of $32,597.36, without stating which item is being disallowed and therefore taxpayer cannot set forth the basis on which it relies.

(j) The Commissioner of Internal Revenue disallowed $835.43 of Purchases, of a total of $830,201.07, without setting forth which item or items are being disallowed and therefore the taxpayer is unable at this time to set forth the facts on which it relies.

(k) The Commissioner of Internal Revenue arbitrarily disallowed all the Bad Debts actually incurred in the regular course of taxpayer's business during the current fiscal year and deducted on its books and on its tax returns. The names and amounts of bad accounts consisted of the following:

| | | |
|---|---|---|
| Ben Glass | $ 571.13 | |
| Harding | 459.54 | |
| Service | 392.64 | |
| Wesco | 1,000.40 | |
| Total Bad Debts charged | | $2,423.71 |

(l) The Commissioner of Internal Revenue has arbitrarily increased petitioner's taxable income by $2,727.40 without setting forth the basis for such alleged omitted income and therefore petitioner is unable to set forth at this time the facts on which it relies.

WHEREFORE, the taxpayer requests this Honorable Court to grant its petition for a hearing and to determine that there is no deficiency in income tax due for the fiscal year ended August 31, 1954.

BERNARD WEISS
*Counsel for Petitioner*
136 East 57th Street
New York 22, N. Y.

December 1957

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

HERBERT KIRSHNER, being duly sworn, deposes and states that he is President of the National Plate & Window Glass Co., Inc. and as such is duly authorized to verify the petition; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true.

/s/ HERBERT KIRSHNER,
Herbert Kirshner

SEAL

Subscribed and sworn to before me this 18th day of December, 1957.

JOHN CINCOTTA
Notary Public
No. 305697950
Nassau County
Cert. Queens County
Expires 3/30/58

**EXHIBIT 2**

EXHIBIT "A"

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

P.O. Box 1706, Grand Central Annex

New York 17, N. Y.

Office of
Director of Internal Revenue

In replying refer to
UM:Au:R:JTL:mw

October 28, 1957

National Plate & Window Glass Co., Inc.
139-05 Archer Avenue
Jamaica 35, New York

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended August 31, 1954 discloses a deficiency in tax of $11,203.81, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D.C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District

of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Very truly yours,

RUSSELL C. HARRINGTON
Commissioner

by KENNETH W. MOE
Director of Internal Revenue

Enclosures:

# STATEMENT

NATIONAL PLATE & WINDOW GLASS CO. INC.
139-05 Archer Ave.
Jamaica 35, New York

Tax Liability for the Taxable Year ended
August 31, 1954

## INCOME TAX

| Liability | Assessed | Deficiency |
|---|---|---|
| $12,588.23 | $1,384.42 | $11,203.81 |

This determination of your income tax liability has been made upon the basis of information on file with the Internal Revenue Service.

A copy of this letter and statement has been mailed to your representative, Mr. Bernard Weiss, 136 East 57th Street New York, N. Y., in accordance with the instructions set forth in the power of attorney executed by you.

## ADJUSTMENTS TO INCOME

| | | |
|---|---|---|
| Net income disclosed by return | | $4,614.73 |
| Unallowable deductions and additional income: | | |
| (a) Sales expenses | $6,888.71 | |
| (b) Travel and entertainment | 3,940.11 | |
| (c) Freight | 318.13 | |
| (d) Commissions | 6,831.96 | |
| (e) Petty cash | 4,405.67 | |
| (f) Purchases | 835.43 | |
| (g) Telephone | 217.34 | |
| (h) Bad debts | 2,423.71 | |
| (i) Income | 2,727.40 | 28,588.46 |
| Net income adjusted | | $33,203.19 |

## Explanation of Adjustments

(a) to (h) inclusive. These deductions claimed on your return have been disallowed to the extent shown inasmuch as they have not been substantiated as allowable under the provisions of the Internal Revenue Code.

(i) It has been determined that you realized additional taxable income in the amount indicated which you did not report on your return.

## Computation of Tax

| | | |
|---|---|---|
| Net income adjusted | $33,203.19 | |
| Normal tax and surtax—$33,203.19 at 52% less $5,500.00 | | $11,765.66 |
| Excess profits net income | $33,203.19 | |
| Less: Excess profits credit | 25,000.00 | |
| Adjusted excess profits net income | $ 8,203.19 | |
| Excess profits tax at 30% | $ 2,460.96 | |
| Allocable on a 122/365 basis | | 822.57 |
| Corrected income tax liability | | $12,588.23 |
| Income tax previously assessed | | 1,384.42 |
| Deficiency in income tax | | $11,203.81 |

**EXHIBIT 3**

TAX COURT OF THE UNITED STATES

| | |
|---|---|
| NATIONAL PLATE & WINDOW GLASS CO. INC., *Petitioner*, *v.* COMMISSIONER OF INTERNAL REVENUE, *Respondent*. | Docket No. 71278 |

**Answer**

THE RESPONDENT for answer to the petition filed in the above-entitled case admits and denies as follows:

1, 2, 3. Admits the allegations of paragraphs 1, 2 and 3 of the petition.

4(a), (b). Denies the allegations of error set forth in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a). Admits the allegations of subparagraph (a) of paragraph 5 of the petition.

(b) to (l), inclusive. Denies the allegations of subparagraph (b) to (l), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied and the determination of the respondent be in all things approved.

ARCH M. CANTRALL
Chief Counsel
Internal Revenue Service

OF COUNSEL:

ELMER R. KEMPER
Regional Counsel

JAMES J. QUINN
Special Attorney
Internal Revenue Service
Office of Regional Counsel
90 Church Street, New York, N. Y.